# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

DAVE CULJAK,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

No. 6469

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Curtis D. Wilbur, presiding judge; Honorable Wm. H. Sawtelle, and Honorable Wm. P. James, judges thereof.

## Petition for Rehearing

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The importance of this case in the beginning was vested wholly in the individual lost in the record as the "appellant." That is to say, among the great mass of cases constantly urged before this court for consideration this one is trivial in the extreme—except perhaps to such appellant. But the decision rendered by Your Honors appears to put the stamp of approval

upon a departure from correct principle and established procedure so radical and so mischievious, it seems to the writer, as to cause the interest of the appellant to yield to that of the bench and bar of this circuit, and it is now primarily in the interest of the latter that we return to this court respectfully to urge a reconsideration.

Your Honors have agreed with us in the main. You grant to be well established the rule urged upon appeal that different defendants may not be charged in one indictment, some of whom are charged with one crime and some with another. You go on to say, "and the rule adverted to may not, by judicial interpretation, be made to yield to a claim of expediency, born of the desire of public prosecutors to hasten the progress of criminal causes before the courts, however commendable the purpose in view. It is grounded in the right, always accorded a person accused of crime, to a fair and impartial trial and to be convicted upon proof of his own acts, unaffected by the atmosphere that may surround another defendant tried before the same jury for a different offense." And how truly the court speaks! But Your Honors proceed in the final breath to undo your own words and to annihilate the admitted principle, by holding that the violation of this rule may be cured, in some

instances at least, by the event of such unfair trial! Such a consummation *must* be faulty. If it be granted that a defendant may not be forced into a trial where he cannot have a *fair* one, and it be further granted that he *has been* forced into just such an unfair one, the appellate court *must perforce be foreclosed of any further consideration,* else law and logic cease to hold sway. For no appellate court may rightfully affirm any judgment unless it can affirm of such judgment that it shows the defendant to have had a *fair trial!* If he has had a fair trial, then of course it is not to be said that he was forced into an unfair one, and the premise in the first instance fails.

We grant for the sake of argument that were the court permitted to consider the question whether the defendant was actually prejudiced in the present instance the court's conclusion is not unsound. Indeed, to make the issue clear cut, we grant in all fullness that such concession does no particular violence to the facts in the present case. But we affirm that where there is shown to have been a misjoinder of parties defendant and one of the defendants has been forced, over objection, into a common trial with another defendant charged with a crime in which the first is not concerned, *prejudice must be presumed without discussion,* and the cause reversed; that the error is

incurable; that to hold otherwise, or to proceed otherwise, to look further and attempt to say whether in a given instance any harm has been done the particular defendant is to put the universal rule of *fair trial* upon a *debatable* footing, and opens the door to no end of mischief. This particular case is of no great moment, granted. But the effect of the ruling upon future cases is portentious.

To begin with, and to avoid unnecessary argument of our own, we assert that the Supreme Court of the United States has foreclosed all argument by deciding the mater for us. They did so in the case of *McElroy v. United States,* 164 U. S. 76, 41 L. Ed. 355. We discused that case in our brief and Your Honors advert upon it slightly in your opinion. But you content yourselves with saying of it, only, that it determined that different defendants might not be charged in the same indictment where they were not all included in each count thereof. Such, as far as it goes, was indeed the holding of that court. But did not the court go farther than that? Did they not also say in precise words, in that case, that in those cases involving a misjoinder of *parties* the trial courts have no discretion in the matter? And did they not in that case hold, in effect at least, that in such class of cases (misjoinder of parties), *prejudice must be presumed,* and

that when defendants not common to all the charges are forced together into a common trial the error is fatal and incurable? We so read the case, Your Honors, but before quoting the words of that court to the point let us have before us clearly the situation as it existed in that court calling for the expression.

In the *McElroy* case there were five defendants in one indictment and three in another. The three in the last indictment were common to both indictments. Those indictments had been consolidated for trial by the lower court, at the instance of the government and over the objection of all the defendants. In the supreme court the objections of the defendants to this procedure was again being pressed. By that time counsel for the government apparently had sensed the jeopardy of his *whole* case by the procedure adopted, and attempted to save a *portion* of it by confessing a reversal as to the two defendants not common to both indictments, but asking affirmance as to the other three, claiming that the latter could lay no claim to prejudice by the common trial. In other words, his proposition paraphrased was just this: "We admit we were wrong. We admit that we began a case in a manner we should not have done. We had one count against five men, and we had a second count against three. And we forced a trial of the two counts to-

gether, over objection of all the defendants, thinking that because the three men in the last count were three of the five men in the first we had a right so to do under section 1024 of the revised statutes (Comp. Stat. 1690). We now realize that such section concerns itself only with a joinder of offenses, and has nothing to do with a joinder of parties, and now confess our error. We therefore confess that this court may reverse the case as to the two men who were not common to both counts, namely Stufflebaum and Charles Hook, but as to the other three we ask the court to affirm the judgment because they *were* common to both the counts and could not have been prejudiced by the course taken." Now, what was the court's answer? We quote (the italics being supplied by us):

> "It is admitted by the government that the judgments against Stufflebaum and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several *felonies* of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the *par-*

> *ties* are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such cases that *all* the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and *did not rest in mere discretion.*" 164 U. S. at page 80, 41 L. Ed. at page 357.

It appears to us it would be hard to find words more apt or forcible to convey the thought that the supreme court were of the opinion that lower courts are foreclosed of any consideration of the question of prejudice — that prejudice is and always must be *presumed* when one defendant has been forced, over objection, into a common trial with another defendant charged with a crime in which the first is not involved. We interpret the court to mean that the error is deemed fatal, incurable, and beyond discussion. We think that court felt, with us, that trial courts must start their trials fairly—that, if they cannot start them fairly they may not start them at all! And let's don't discuss it!

We respectfully suggest a re-examination of that case and especially the words last quoted. If this court is so inclined let it be done in the conscious

thought that whatever be the interpretation of the words they constitute the *court's reply to an invitation to consider the question of prejudice.*

After considering, erroneously, we think, the question of prejudice, and then resolving it rightly, we grant, against appellant, Your Honors call attention to some four cases wherein had been involved the question of misjoinder of *offenses,* and say: "These decisions, we believe, apply *with equal reason* to the situation which this case presents." (Italics ours.)

While we are unable to subscribe heartily, or at all, with that proposition, we decline the quarrel; because, as we said in the beginning, the decision, by proceeding to analyze the evidence and to weigh the question of actual prejudice after conceding that the procedure questioned inherently precluded a fair trial, places the right of fair trial, hitherto thought inviolate, upon a debatable basis. If we debate it now, we shall have to debate it always. Whereas it is to avoid being compelled to debate it at all, that this petition to reconsider is written.

Besides, if we were to enter upon the court's "with equal reason" proposition, we would have to go over again ground that we fully covered in our brief upon appeal wherein we were at great pains to point out

the distinction between misjoinder of *parties* and misjoinder of *causes,* and the different considerations and principles pertaining to and governing the two classes, and asked the court to bear those distinctions in mind; but with so little avail that we now find the court writing: "Subject to the qualifications hereinafter stated, a motion to quash on indictment for misjoinder, *either of offenses or parties defendant,* is addressed to the discretion of the court, * * *." That puts us so far apart that accord seems hopeless anyhow. Discretion the lower court has in one class—joinder of *causes.* We know it; we concede it; and we are not concerned with or about it. But if the trial court has any discretion with respect to joinder of *parties,* we don't know it; and if the Supreme Court of the United States knows it, then they woefully misspoke themselves in the *McElroy* case. (See again the quotation from that case published herein.)

We know of no words with which to end our plea more appropos than those of the supreme court of the state of Missouri, taken from the case of *State v. Mitchell,* 25 Mo. 420:

> "There is no policy in encouraging carelessness or laxity in criminal pleadings. When any departure from the required form is tolerated it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as

> a precedent and urged as a reason why there should be a greater relaxation of the rule requiring observance of forms. In this way the courts will be led step by step to the subversion of all order in the administration of the criminal code."

Finally, Your Honors, let us make a respectful suggestion. There is pending in this court another case involving the identical question. *Brown et al v. United States,* your number 6542. Another brief is there offered upon the same question. That case was argued in September at Portland, when the make-up of this court was differently constituted. The opinion, not being published as yet, we assume is now in the writing. If not already suggested to the mind of the court in some manner is it amiss in us to suggest that the two cases be considered together, that the decisions shall be harmonious?

Respectfully submitted,

H. Sylvester Garvin.

I. H. Sylvester Garvin, counsel for the appellant in the foregoing petition for re-hearing, hereby certify that said petition has not been interposed for delay, and in my judgment it is well founded in law.

H. Sylvester Garvin,
*Attorney for Appellant.*